

Entered on Docket

August 06, 2010

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed: August 06, 2010

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 09-45389-EDJ 7
NADER MALEK, Chapter 7

Debtor. /

MARCIA FLAGG, Adv. No. 09-4403

Plaintiff,

vs.

NADER MALEK,

Defendant. /

DECISION

By her amended complaint herein, plaintiff Marcia Flagg ("Flagg"), the former spouse of defendant Nader Malek, the above debtor ("Malek"), seeks to bar Malek's general discharge pursuant to various subsections of Bankruptcy Code § 727(a).¹ Specifically,

¹All further section references herein are to the Bankruptcy Code, 11 U.S.C. § 101 et. seq.

Decision

1 Flagg alleges Malek's failure to keep and preserve books and
2 records, § 727(a)(3), making of a false oath or account,
3 § 727(a)(4)(A), failure to explain satisfactorily a loss or
4 deficiency of assets, § 727(a)(5), and refusal to obey a lawful
5 order of the court, § 727(a)(6)(A).²

6 Flagg also alleges that the debts Malek owes her are
7 nondischargeable under Bankruptcy Code § 523(a)(15) (certain debts
8 owing to a spouse or former spouse in connection with a divorce
9 proceeding). As to this claim, this court abstained in favor of the

10 _____
11 ²The relevant portions of Bankruptcy Code § 727(a) read as
12 follows:

13 The court shall grant the debtor a discharge, unless-

14 . . .

15 (3) the debtor has concealed, destroyed, mutilated,
16 falsified, or failed to keep or preserve any recorded
17 information, including books, documents, records, and papers,
18 from which the debtor's financial condition or business
19 transactions might be ascertained, unless such act or failure to
act was justified under all of the circumstances of the case;

20 (4) the debtor knowingly and fraudulently, in or in
connection with the case--

21 (A) made a false oath or account;

22 . . .

23 (5) the debtor has failed to explain satisfactorily, before
determination of denial of discharge under this paragraph, any
loss of assets or deficiency of assets to meet the debtor's
liabilities;

24 . . .

25 (6) the debtor has refused, in the case--

26 (A) to obey any lawful order of the court, other than
an order to respond to a material question or to
testify . . .

1 California Superior Court.

2 The court will issue its judgment in favor of Malek as to
3 Flagg's claims under § 727(a).

4 A. Background

5 Prior to the filing of his voluntary chapter 7 petition on June
6 18, 2010, Malek was in the business of selling figurines and
7 statuettes on the internet. Malek operated this business under the
8 name of "Accent Stuff." His primary sales outlet was the popular
9 website, Ebay, although Malek did make some direct sales. For the
10 most part, Flagg's allegations concern the records, inventory, and
11 sales of Accent Stuff, and the disclosures regarding the business
12 that Malek made in connection with his bankruptcy case.

13 B. Fraudulent Concealment - § 727(a)(5)

14 Initially, the court notes that § 727's denial of discharge
15 provisions must be construed liberally in favor of the debtor and
16 strictly against those objecting to discharge. In re Devers, 759
17 F.2d 751, 754 (9th Cir. 1985); In re Adeeb, 787 F.2d 1339, 1342 (9th
18 Cir. 1986); In re Bernard, 96 F.3d 1279, 1281 (9th Cir. 1996).

19 Flagg's complaint alleges that Malek fraudulently concealed
20 business inventory, thus triggering Bankruptcy Code § 727(a)(5)
21 (failure to explain loss of assets). At trial, however, Flagg
22 presented no material evidence in support of this claim, and the
23 court ruled at the conclusion of Flagg's case in chief that Malek
24 need not put on any evidence in defense thereof. Fed. R. Civ. P.
25 52(c), applicable via Fed. R. Bankr. P. 7052.

26 //

1 C. Failure to Obey a Court Order - § 727(a)(6)(A)

2 Flagg's complaint also alleges that this court ordered Malek to
3 attend a continued meeting of creditors and that Malek did not
4 attend, thus triggering Bankruptcy Code § 727(a)(6)(A). The
5 evidence showed, however, that there was no continued meeting of
6 creditors for Malek to attend because the trustee in bankruptcy had
7 excused Malek from appearing. The court therefore ruled at the
8 conclusion of Flagg's case in chief that Malek need not put on any
9 evidence in defense of this claim. Fed. R. Civ. P. 52(c),
10 applicable via Fed. R. Bankr. P. 7052.

11 D. Failure to Maintain Adequate Books and Records - § 727(a)(3)

12 "In order to state a prima facie case under section 727(a)(3),
13 a creditor objecting to discharge must show (1) that the debtor
14 failed to maintain and preserve adequate records, and (2) that such
15 failure makes it impossible to ascertain the debtor's financial
16 condition and material business transactions." In re Cox, 41 F.3d
17 1294, 1296 (9th Cir. 1994) quoting Meridian Bank v. Alten, 958 F.2d
18 1226, 1232 (3d Cir.1992).

19 Here, the evidence showed that Malek maintained sufficient
20 records from which any creditor and the trustee in bankruptcy could
21 ascertain his financial condition and material business
22 transactions. Malek possessed records regarding all of his sales
23 through Ebay, which Ebay maintained for Malek. Malek also kept a
24 running inventory, adding to it as he acquired new items for sale,
25 and deleting from it as items were sold. Malek also maintained
26 checking account statements for all his cash receipts from the

1 business, whether from Ebay sales or otherwise.

2 Malek sometimes purchased inventory on credit, using his credit
3 card to fund the purchases. Malek preserved the credit card
4 statements for the accounts in question. Malek also preserved
5 invoices, shipping documents, wire transfer confirmations, and in
6 some cases, photographs of his inventory.

7 Flagg contends that the foregoing is not enough, and that Malek
8 should be denied a discharge because he did not prepare formal
9 balance sheets and profit and loss statements.

10 The court rejects Flagg's argument. Section 727(a)(3) does not
11 require a debtor to prepare and maintain any particular type of
12 financial statements or records. Cox, 41 F.3d at 1299. Here, the
13 records Malek kept and maintained were clearly sufficient for a
14 relatively small business such as Accent Stuff. Id.

15 E. False Oath - 727(a)(4)(A)

16 In order to bring a successful § 727(a)(4)(A) claim for false
17 oath, the plaintiff must show: (1) the debtor made a false oath in
18 connection with the case; (2) the oath related to a material fact;
19 (3) the oath was made knowingly; and (4) the oath was made
20 fraudulently. In re Wills, 243 B.R. 58, 62 (9th Cir. BAP 1999); In
21 re Khali, 379 B.R. 163, 172 (9th Cir. BAP 2007).

22 Here, Flagg contends that Malek understated his gross income on
23 his Amended Statement of Financial Affairs. She arrived at this
24 conclusion by adding up the total amount of deposits to Malek's
25 business checking account for the years in question, arguing that
26 the totals exceed the amount of income Malek showed on his Amended

1 || Statement of Financial Affairs.³

Malek testified that he often borrowed money from family members and deposited the proceeds into his business checking account, that all the deposits reflected in the statements for that account were not gross receipts from the business, and that he accurately disclosed his income.

Even so, it appears that the \$45,000 gross income figure Malek disclosed for 2008 was inaccurate. Flagg's Exhibit 3 shows that Malek's Ebay sales that year totaled \$61,707, after deduction for unpaid items, and that Malek sold an additional \$35,000 in merchandise (after deduction of shipping fees) other than through Ebay.

13 Malek's federal tax return for 2008, which he filed in February
14 2010, showed that Malek's gross income for the year was \$96,204,
15 which realized him a net profit of \$7,413 after deduction for cost
16 of goods sold, commissions, shipping expense, and advertising.

17 In any event, even if the gross income figures Malek presented
18 were in error, Malek would still prevail as to this claim for relief
19 because Flagg presented no evidence that Malek made any such errors
20 "knowingly and fraudulently" within the meaning of § 727(a)(4)(A).
21 Flagg offered no suggestion as to who Malek might have been trying
22 to mislead, or to what end he might have made the attempt. And

1 absent a finding of Malek's actual intent to defraud, the errors
2 regarding his gross income cannot be a basis for denial of his
3 discharge pursuant to § 727(a)(4)(A). In re Roberts, 331 B.R. 876,
4 883-84 (9th Cir. BAP 2005), aff'd, 241 Fed.Appx. 420 (9th Cir.
5 2007). This is so even if Malek was guilty of sloppiness. In re
6 Coombs, 193 B.R. 557, 567 (Bankr. S.D. Cal.1996).

7 Moreover, although it is not determinative, it is worth noting
8 that Flagg does not claim that she, the trustee in bankruptcy, or
9 any other party in interest in the bankruptcy case was actually
10 misled in any way by any misstatements by Malek of his gross income,
11 or that any such misstatements were detrimental to the
12 administration of Malek's bankruptcy estate. See Wills, 243 B.R. at
13 63-64.

14 Flagg also contends that Malek fraudulently misstated his rent
15 or mortgage payment on Schedule J (Current Expenditures) by stating
16 that his monthly expense for rent or mortgage payments was \$1,000.
17 Flagg bases this contention on the fact that Malek did not actually
18 make some of the payments.

19 This allegation is meritless. The amount a debtor is required
20 to disclose is not the amount of rent or mortgage payments the
21 debtor actually paid or made, but the "average or projected monthly
22 expenses" of the debtor at the time of the petition. Instructions
23 to Schedule J, Official Form 6J. Here, Flagg presented no evidence
24 that Malek misstated his average or projected rent or mortgage
25 expense, or that he intended anything fraudulent in making the
26 disclosure at issue.

1 F. Conclusion

2 For the foregoing reasons, the court will issue its judgment
3 denying any relief to Flagg, and providing that, subject to the
4 personal financial manangement course requirement of § 727(a)(11),
5 Malek is entitled to a discharge of all his debts other than those
6 that are nondischargeable under Bankruptcy Code § 523(a).

7 ** END OF MEMORANDUM **

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